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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING
Docket No. WEST 87-28-M
A.C. No. 42-01661-05504

v.

PIONEER SAND & GRAVEL COMPANY,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Mr. Ronald Savage, Vice President, Pioneer
Sand and Gravel Company, pro se.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., ("Mine Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges the operator of an open pit mine with violating safety standard 30 C.F.R. 56.11001 which requires that safe means of access must be provided and maintained to all working places. The Secretary charges that safe access was not provided to the work place under the primary trap where a laborer was cleaning up spilled materials while front end loaders were dumping material into the trap.

On July 29 and 30, Mr. James Skinner, a MSHA mine inspector, inspected the Pioneer Sand and Gravel Pit. As the result of that inspection he cited the operator for allegedly violating four mandatory safety standards.

The Secretary of Labor thereafter initiated this proceeding with the filing of a petition for assessment of a civil penalty pursuant to section 110(a) of the Mine Act. Each citation number, date issued, standard allegedly violated, and the Secretary's proposed penalty is as follows:

Citation No.	Date	30 C.F.R.	Proposed Penalty
2644264	7/30/86	56.12005	74.00
2644265	7/30/86	56.12013	74.00
2644266	7/30/86	56.11001	400.00
2644267	7/30/86	56.9006	20.00

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Pioneer Sand & Gravel Company filed a timely answer contesting the existence of all the violations and the amount of the related proposed civil penalties. After notice to the parties, an evidentiary hearing on the merits was held before me on June 11, 1987, at Salt Lake City, Utah.

At the hearing respondent Pioneer Sand and Gravel Company withdrew its notice of contest of three of the four citations and the related proposed penalties so as to leave in contest Citation No. 2644266 which alleges a violation of 56.1101 and its related proposed civil penalty.

Issues

1. Whether or not there was a failure to provide safe access to a work place as required by 30 C.F.R. 56.11001.
2. If a violation of 30 C.F.R. 56.11001 is found should the violation be classified as "significant and substantial."
3. The amount of the penalties.

Stipulations

The parties entered into stipulations as follows:

1. Pioneer Sand and Gravel Company, respondent, operates the sand and gravel pit designated "Pioneer Sand and Gravel Pit" located near Kearns, Utah.
2. The respondent in its operation of the Pioneer Sand and Gravel Pit is subject to the provisions of the Mine Act.
3. As the Administrative Law Judge assigned by the Federal Mine Safety and Health Review Commission to hear this case, I have jurisdiction to hear and decide this case.
4. Respondent is a small operator employing approximately 12 employees.
5. Respondent exercised good faith in the abatement of the violations.
6. The proposed penalties would not affect the ability of respondent to continue in operation.
7. During the two year period ending June 29, 1986, respondent had a total of two violations which had an assessed penalty of \$20.00 each.

Citation No. 2644266

The citation alleges:

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One of the plant operators was cleaning up material under and near the primary trap while two (2) front-end loaders were dumping into the trap intake. The employee was subjected to being hit by large falling rocks. Some of the rocks were 12 inches in diameter. The employee could be fatally injured if hit by one of these rocks. The above situation did not provide the employee with a safe access.

The Regulation

30 C.F.R. 56.11001 provides as follows:

Safe means of access shall be provided and maintained to all working places.

Review of Evidence and Discussion

The Pioneer Sand & Gravel Pit has a primary crushing operation and a subsequent wash plant. The plant produces sand and aggregate up to two inches in size and sells to both residence and commercial customers.

At the time of the inspection four employees worked at the plant. The employees consisted of two front-end loader operators who dump the sand and gravel into a funnel like trap which funneled the raw material onto the prime conveyor belt below. This belt took the raw material into the plant for processing.

In addition to the two front-end loader operators there was a crusher operator who operates the controls and a laborer.

The employee who allegedly was exposed to the hazard of falling rocks was the laborer who spent 15 to 20 minutes each day cleaning up in an area below the trap next to the conveyor. Using a shovel he cleaned up the fine material and rocks that occasionally spilled off the conveyor belt onto the conveyor's platform floor. The conveyor was waist to chest high. The laborer shoveled the spilled material back on the conveyor belt.

The entrance to the area under the trap was a corridor two or three feet wide. The inspector testified "I couldn't actually see him back in under the trap, but he was working back in there and then progressing." (T. 35). It appeared to the inspector from his point of observation that the laborer did not have safe access to the area where the laborer was working. At the time the two front-end loaders using an elevated roadway, were dumping raw material from the pit into the trap. The inspector stated "it appears that while the loaders were dumping he (laborer) could have been struck by material had the loader not positioned (his load) just right."

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However, the inspector did not observe any falling material of any kind. Other than "occasional dust" no rocks or other material spilled over the top rim of the trap.

The agency records indicate that the company abated the alleged violation by instituting a practice of shutting off the power to the conveyor and prohibiting the dumping of material into the trap while the employee was cleaning the spillage in the area below the trap.

Respondent presented evidence that the trap was 10 feet wide and 20 feet long. Half way back it had a solid metal headwall that was 8 1/2 feet high. There was a fluorescent red line about 18 inches below the back side of the trap and the material dumped into the trap was kept 18 inches to two feet below the head wall.

Mr. Savage respondent's vice president testified that it would be "virtually impossible" for a rock to ever come over the rim of the hopper. He also explained that there was approximately 20 feet (horizontally) from the place where the material was being dumped to where the laborer was doing the clean up. In his opinion there was no "danger in any way" to the employee working below.

Employer presented evidence that due to changing conditions in the pit the cited practice and the entire trap area was discarded in May of 1987. It was not discarded because of any suspected hazard.

During the five year period preceding this citation MSHA inspectors inspected the pit at least twice a year and none noted or commented to respondent about any potential hazard involved in the cited practice.

Although the inspector did not observe any falling material other than occasional dust, it was the Secretary's position that there was a "possibility that in a moment of mental lapse on the part of the operator" of the front-end loader that a load could be dumped in such a manner that rocks would come over the headwall and down on the laborer as he walked underneath the trap to or from a work point.

On the basis of the evidence presented I find that there was a violation and a remote possibility it could result in an injury. However, I find the possibility of such an accident is unlikely rather than a reasonable possibility. I therefore find that there was a violation of 30 C.F.R. 56.11001 but that the violation was not "significant and substantial".
Significant and Substantial Violation

A "significant and substantial" violation is defined in section 104(d)(1) of the Mine Act as a violation "of such nature

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as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazardÄthat is, a measure of danger to safetyÄcontributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

In this case based upon the plant's past history and the evidence presented by respondent it is found that it is unlikely that the hazard contributed to will result in an event in which there is an injury. I therefore find the violation of 30 C.F.R. 56.11001 was not significant and substantial.

The gravity of the violation is high with respect to the seriousness of the injury which could result if a rock were to fall over the top of the trap and hit an employee. However, the likelihood of such an accident is found to be very low. This finding is consistent with the 21 year history of no injury from falling rocks while using the practice and procedure for which the citation was issued. The employer's negligence is evaluated

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as low. I accept the stipulations of the parties with respect to the remaining statutory criteria set forth in section 110(i) of the Mine Act.

I have considered the six statutory penalty criteria set forth in Section 110(i) of the Mine Act, and find that the appropriate penalty for the violation cited in Citation No. 2644266 is \$75.00, and with respect to Citation Nos. 2644264, 2644265 and 2644267 the appropriate penalties are the penalties proposed by the Secretary, which are \$74.00, 74.00 and 20.00 respectively.

Based upon the entire record the stipulations and the findings made in the narrative portion in this decision the following conclusions are entered:

CONCLUSIONS OF LAW

1. The Pioneer Sand & Gravel Pit operated by Pioneer Sand & Gravel Company is subject to the provisions of the Mine Act.

2. The Commission has jurisdiction to decide this case.

3. Respondent violated 30 C.F.R. 56.11001; the violation was not significant and substantial; a civil penalty of \$75 is assessed.

4. Respondent violated 30 C.F.R. 56.12005.

5. Respondent violated 30 C.F.R. 56.12013.

6. Respondent violated 30 C.F.R. 56.9006.

7. The Secretary's proposed penalties for the violations found in findings 4, 5, and 6 are appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

1. Citation No. 2644266 as modified by deleting the characterization of the violation as significant and substantial is affirmed.

2. Citation No. 2644264 and the proposed \$74 are affirmed.

3. Citation No. 2644265 and the proposed \$74 penalty are affirmed.

4. Citation No. 2644267 and the proposed \$20 penalty are affirmed.

Pioneer Sand and Gravel Company is ordered to pay within 40 days of the date of this decision a civil penalty of \$243.00.

August F. Cetti

Administrative Law Judge